

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

September 18, 2007 Session

ORTEGA WILTZ v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2001-C-1673 Cheryl Blackburn, Judge**

No. M2006-02740-CCA-R3-PC - Filed April 25, 2008

Petitioner, Ortega Wiltz, was convicted by a Davidson County jury of two counts of facilitation of especially aggravated kidnapping and one count of facilitation of aggravated kidnapping. The trial court merged the conviction for facilitation of aggravated kidnapping into one of the convictions for facilitation of especially aggravated kidnapping. As a result of his convictions, Petitioner was sentenced to consecutive twenty-year sentences. This Court affirmed Petitioner's convictions and sentences on direct appeal. *See State v. Christopher L. Williams*, No. M2003-00517-CCA-R3-CD, 2005 WL 639123, at *1 (Tenn. Crim. App., at Nashville, Mar. 16, 2005), *perm. app. denied*, (Tenn. Oct. 10, 2005). Petitioner subsequently sought post-conviction relief on the basis of ineffective assistance of counsel. The post-conviction court denied the petition after a hearing. On appeal, Petitioner argues that the post-conviction court improperly denied the petition. We affirm the judgment of the post-conviction court because we conclude that Petitioner failed to establish that he received ineffective assistance of counsel at trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES, and THOMAS T. WOODALL, JJ., joined.

Anne M. Davenport, Nashville, Tennessee, for the Appellant, Ortega Wiltz.

Robert E. Cooper, Jr., Attorney General & Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Bret Gunn, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

Factual Background

Petitioner was indicted in August of 2001 by the Davidson County Grand Jury for two counts of especially aggravated robbery and seven counts of especially aggravated kidnapping. Petitioner's case proceeded to trial, where he was tried along with co-defendants Christopher L. Williams and Corey A. Adams. According to this Court's opinion on direct appeal, the following facts were elicited through the testimony at trial:

On May 29, 2001, Appellant Christopher L. Williams telephoned Willie Robertson and asked to see a recording studio Robertson intended to rent. The studio was located in the basement of a house owned by Rick Harbin, which house was located on 108 Keaton Avenue in Nashville. Harbin lived above the studio. Robertson agreed to meet Appellant Williams and telephoned Harbin to ask him to unlock the studio. At approximately 8:00 p.m., Robertson and his four-year-old son, Willie Moss, drove to meet Appellant Williams at a convenience store. When Appellant Williams arrived, he was accompanied by Appellants Corey A. Adams and Ortega Wiltz. The appellants followed Robertson to the studio. At trial, Robertson testified that he had known Appellants Williams and Adams for approximately ten years and that as juveniles they had been in Woodland Hills Youth Development Center at the same time. However, Robertson testified that he had never before seen Appellant Wiltz.

When they arrived at the studio, Robertson left his son sleeping in the backseat of his car which was parked outside the door to the studio. Harbin met the men downstairs and unlocked the door. He and Robertson then showed the appellants around the studio. However, within minutes, Appellant Williams pointed a gun in Robertson's face and said, "I know you got some money. I need some money." Robertson told Appellant Williams that he had invested all his money in the studio and had only three dollars. Appellant Williams then ordered Robertson to get on the floor and placed his gun in Robertson's mouth. When Robertson informed Appellant Williams that he might be able to "get them some [money]," Appellant Williams replied, "[M]y boys think you're playing." Appellants Williams and Adams then blindfolded Robertson and hogtied him with a chain. According to Robertson and Harbin, all three appellants were armed with guns.

Meanwhile, Appellant Wiltz struck Harbin in the head with a pistol, knocking him to the ground. Appellants Williams and Wiltz then dragged Harbin into an adjoining room and ordered him to "lay down and be quiet." Thereafter, Appellant Williams returned to the other room, while Appellant Wiltz bound Harbin, placed a

rope around his neck, and struck him in the head and legs with an axe handle. Once Robertson and Harbin were restrained, Appellant Wiltz picked up a handsaw and “slashed” their throats. Although the saw cut the victims’ throats and caused bleeding, the cuts were not “major.” Appellant Wiltz also attempted to smother Harbin with a plastic bag, “gagged” him, and took his cellular telephone, keys, and money.

While Appellant Wiltz “work[ed] with” Harbin, Appellants Williams and Adams forced Robertson to telephone people he knew to ask for money. Although Robertson’s restraints had been loosened to permit him to use the telephone, he remained blindfolded, and his hands were bound with a chain. After making several calls, Robertson informed Appellant Williams that his cousin, Eric “Smurf” Brown, would give him some money, but he would have to drive to south Nashville. Appellant Williams took Robertson out of the studio and placed him in the backseat of his vehicle. Appellants Williams and Adams then got into the vehicle and drove toward south Nashville. Appellant Wiltz followed in Robertson’s vehicle with the child asleep in the backseat.

The appellants left Harbin lying bound and gagged on the studio floor. Harbin testified at trial that he felt his body “getting cold because [he] had . . . lost a lot of blood.” Eventually, Harbin was able to remove the gag from his mouth and breathe easier. After approximately forty-five minutes, he managed to escape from his restraints and make his way to the house of a neighbor who was sitting on the porch. The neighbor looked at Harbin, but refused to help him, saying, “I don’t want no problem.” Harbin then “drug [himself] across the street” to another neighbor’s house. As soon as the neighbor saw Harbin, she telephoned the police and paramedics. Harbin was taken to the hospital where he was treated and released.

During the drive to south Nashville, Appellant Wiltz telephoned Appellant Williams and told him to “hurry up and do something” because Robertson’s vehicle was nearly out of gas. Appellant Williams drove to University Court where Brown lived. However, they did not go to Brown’s apartment because Robertson was unable to walk to Brown’s apartment and they did not believe that Brown would give them any money.

Thereafter, Appellant Wiltz parked Robertson’s vehicle in an alley, threw the keys, and ran away, leaving the child in the backseat. Appellant Williams drove to the alley and put the child into the backseat of his car. He then put Robertson into the driver’s seat of Robertson’s vehicle and told him that he had thirty minutes to get some money or they would kill his son. After Appellant Williams drove away, Robertson “[w]iggled out” of the blindfold and climbed out of the car window to

avoid disturbing any fingerprints that may have been on the door. He then ran to the “projects” and flagged down a patrol vehicle.

The officer drove Robertson back to his vehicle and alerted dispatch of the kidnapping. Robertson telephoned Brown to come to the scene. While Brown was at the scene, Appellant Williams, who had taken Robertson’s cellular telephone, telephoned Brown’s cellular telephone and asked to speak with Robertson. Appellant Williams asked Robertson if he had the money. Robertson replied that he had only \$6,000. Appellant Williams told Robertson that six thousand dollars was not enough and to call back when he had more money. According to Robertson, Appellant Williams wanted \$50,000.

Shortly thereafter, Robertson was taken to the Criminal Justice Center. At the Criminal Justice Center, Appellant Williams again telephoned Robertson and inquired about the money. Robertson informed Appellant Williams that he had only \$8,300. Appellant Williams replied, “[W]ell, bring that. That’s cool.” Robertson and Appellant Williams agreed to meet in north Nashville. Robertson relayed the information to police, and officers were dispatched to the area. Robertson was subsequently informed that the kidnappers had been apprehended, and his son was brought to the Criminal Justice Center. While at the Criminal Justice Center, officers asked Robertson to view a photographic lineup that included a photograph of Appellant Adams. At that time, Robertson was unable to identify Appellant Adams; however, he positively identified Appellant Adams at the preliminary hearing. Harbin viewed the lineup while at the hospital and immediately identified Appellant Adams as one of the kidnappers.

At trial, Metro Police Officer Jeffrey Tharpe testified that on May 29, 2001, he was on patrol at University Court when Robertson approached his patrol car. According to Officer Tharpe, Robertson was “very upset . . . [and] shouting my kid has been kidnapped.” Robertson informed Officer Tharpe that the kidnappers had demanded money and that he knew one of the kidnappers. Officer Tharpe transported Robertson to his vehicle and alerted other officers of the kidnapping, providing a description of the suspect’s vehicle. Officer Tharpe observed a chain in the front seat of Robertson’s vehicle.

Thereafter, Sergeant Duane C. Williamson arrived at the scene. When the cellular telephone Robertson had in his possession began to ring, Sergeant Williamson told Robertson that he wanted to listen to the person on the telephone. As Sergeant Williamson listened, he overheard a man tell Robertson, “I’m not playing. I’m going to shoot him in the stomach.” Robertson informed Sergeant Williamson that the person on the telephone was Appellant Williams. Sergeant Williamson advised Robertson to tell Appellant Williams that he was getting the money together and would meet him in a certain area in north Nashville. Sergeant

Williamson then “flooded” the area with marked and unmarked police cars looking for the suspect’s vehicle.

After being advised of the alleged kidnapping, Sergeant Danny Collins drove past a vehicle matching the description of the suspect’s vehicle. In an attempt to obtain the license plate number, Sergeant Collins followed the vehicle. When the suspect’s vehicle suddenly stopped, Sergeant Collins parked approximately three car lengths behind the vehicle. He observed Appellant Williams step out of the vehicle with what appeared to be a semi-automatic pistol in his right hand. Sergeant Collins alerted the other officers in the area that Appellant Williams was armed and the other officers “moved in.”

Upon seeing the police cars, Appellant Williams jumped into his vehicle and attempted to flee. As Officer Gregory Blair drove by Appellant Williams’ vehicle, he directed a spotlight into the vehicle and observed “two male blacks and a little boy sitting on the passenger’s lap.” Appellant Williams drove around two patrol cars and attempted a sharp right turn, before crashing into a low brick wall. Appellant Williams then jumped from the vehicle and ran. He was apprehended attempting to climb a nearby fence.

After the wreck, Appellant Adams stepped from the vehicle holding the child with his left hand and a black gun in his right hand. Immediately, Appellant Adams released the child and ran into the alley. The child, who was left standing in the street “totally confused and disoriented,” was returned to his father at the Criminal Justice Center. Appellant Adams was subsequently apprehended by the K-9 Squad. Upon being taken into custody, Appellant Adams told the arresting officer, “[M]an, I know I’m in some shit, but I was just caught in the crossfire. I knew about the kidnapping, but I didn’t do it.”

At the scene of the wreck, officers discovered a nine-millimeter pistol between the seats and a .45 caliber semi-automatic pistol and a loaded magazine on the ground outside the passenger-side door. At the recording studio, officers collected a rope, chain, and an antenna that appeared to have been twisted together and used to tie up one of the victims. Officers also processed Appellant Williams’ and Robertson’s vehicles for latent prints, but were unable to match any of the fingerprints to the appellants. However, DNA of a blood sample collected from the backseat of Appellant Williams’ vehicle matched that of a sample taken from Robertson.

On the evening of May 30, 2001, Sergeant Williamson received an anonymous tip from Crime Stoppers “that [the] third person involved was fixing to get on a bus to Chicago, and gave [Sergeant Williamson] the height, weight, and clothing description.” Sergeant Williamson and other officers proceeded to the bus

station and observed Appellant Wiltz at the ticket counter. According to Sergeant Williamson, Appellant Wiltz matched the description and “looked . . . like he was trying to disappear.” Sergeant Williamson approached Appellant Wiltz and identified himself. Appellant Wiltz agreed to talk with officers and went voluntarily to the Criminal Justice Center. At the Criminal Justice Center, Appellant Wiltz agreed to be photographed and have his photograph placed in a lineup. Robertson and Harbin were then asked to view the photographic lineup. Viewing the lineup separately, both Robertson and Harbin positively identified Appellant Wiltz.

. . . .

Appellant Williams related that prior to the preliminary hearing he had never seen Appellant Wiltz.

Appellant Adams testified that prior to his arrest he had never met Robertson, Harbin, or Appellant Wiltz.

. . . .

Appellant Wiltz testified that prior to the instant charges, he had never seen Robertson, Robertson’s son, or Harbin and had never been to the recording studio at 108 Keaton Avenue. He further claimed that prior to the preliminary hearing, he had never seen Appellants Williams or Adams. Appellant Wiltz testified that in the days prior to the alleged offenses, he had traveled by bus from Los Angeles to Las Vegas and Dallas, before arriving in Nashville. When he arrived in Nashville, he rented a hotel room where he “hung out” until deciding to travel to Chicago. On the evening of May 30, 2001, he was at the Greyhound Bus Station when police officers asked to speak with him. The officers then asked him to go to the police station, advising him that he fit the description of an alleged kidnapper. Appellant Wiltz testified that he cooperated with police because he “didn’t do anything.” He denied any involvement in the instant kidnappings. On cross-examination, Appellant Wiltz conceded that he had prior felony convictions of theft and robbery and that he was a drug addict.

Christopher L. Williams, 2005 WL 639123, at * 1-6.

At the conclusion of the jury trial, Petitioner was found guilty of two counts of facilitation of especially aggravated kidnapping (Counts 1 and 3) and one count of facilitation of aggravated kidnapping (Count 2) and Petitioner was acquitted on Counts 4, 5, 6 and 7. The trial court merged Count 2 with Count 1, resulting in two convictions for facilitation of especially aggravated kidnapping. Petitioner was sentenced to consecutive twenty-year sentences. Petitioner’s convictions

and sentences were affirmed on direct appeal. *See Christopher L. Williams*, 2005 WL 639123, at *1.

Subsequently, Petitioner filed a pro se petition for post-conviction relief in which he asserted that he received ineffective assistance of counsel at trial and on appeal because trial counsel: (1) failed to fully investigate the witnesses's anticipated testimony; (2) did not object to the admission of inflammatory photographs; (3) failed to present evidence on Petitioner's behalf; (4) failed to impeach witnesses who gave prior inconsistent statements; (5) failed to inform Petitioner of the nature and consequences of his charges; (6) failed to properly question witnesses; (7) failed to sever his case from his co-defendants; (8) failed to locate alibi witnesses; and (9) was ineffective as appellate counsel due to the deficiencies alleged during his trial representation. Further, Petitioner argued that his conviction was obtained based on perjured testimony, that his conviction was based on an overly suggestive and/or mistaken identification and that his sentence violated *Blakely v. Washington*, 542 U.S. 296 (2004). The post-conviction court appointed counsel and an amended petition was filed. In the amended petition, Petitioner presented the following issues as additional bases for his post-conviction claim: (1) trial counsel was ineffective because he failed to seek suppression of the photographic identification evidence; and (2) Petitioner was arrested without probable cause.

Evidence at the Post-conviction Hearing

At the post-conviction hearing, Petitioner claimed that trial counsel never discussed the details surrounding Petitioner's arrest. However, Petitioner stated that trial counsel did ask what occurred at the bus station or the criminal justice center. Further, Petitioner admitted that he testified at trial regarding his encounter with the police. Petitioner stated that he did not tell all of the details to trial counsel because their meeting only lasted for "a few minutes." Petitioner claimed that police officers dragged him from the bus station by the belt, and placed him in the back of a police car while surrounding him with their hands on their guns. Petitioner admitted that he did not mention being forced to go anywhere with the police during his testimony at trial or to trial counsel during their meetings. Petitioner thought that the information regarding the circumstances of his arrest was crucial to his defense because he was under the influence of marijuana, alcohol, and the prescription psychotic drug Zyprexa at the time of his arrest. However, he did not relay the information regarding the medications to trial counsel. Petitioner also admitted that he neglected to inform trial counsel that he was "booked" and photographed when he arrived at the police station. Petitioner claimed that he forgot about these things and did not remember them until after he was convicted and that he did not include them in his testimony at trial because he was taking medication that "blurred [his] mind sometimes."

Petitioner thought that trial counsel should have sought a severance from the co-defendants because he did not know them and the evidence that was used against them at trial "rubbed off" on him. Petitioner admitted that he did not discuss this desire with trial counsel.

Trial counsel also testified at the post-conviction hearing. Trial counsel testified that at the time of the hearing he had been licensed for seven years and had devoted approximately ninety-nine percent of his practice to criminal work. At trial, Petitioner's trial strategy was that he did not know the co-defendants and had nothing to do with the kidnapping. Trial counsel's first contact with Petitioner was at the jail prior to the preliminary hearing. During that meeting, Petitioner was "facing a corner of the cell and would not talk" so trial counsel had to waive the preliminary hearing. In fact, the first time trial counsel learned about the facts of the case was about "three or four days" after the preliminary hearing. Trial counsel had a mental health evaluation performed on Petitioner as a result of Petitioner's behavior. Petitioner actually cooperated with trial counsel prior to receiving the results of the evaluation.

Trial counsel discussed the events at the bus station with Petitioner. According to trial counsel, he and Petitioner had detailed conversations about the events leading up to his arrest. Petitioner indicated to trial counsel that he went with the police voluntarily. Trial counsel testified that, "At no time did [Petitioner] indicate [to trial counsel] that anybody put him under duress or put their hands on him." Trial counsel did not see any potential issues that would have caused him to file a motion to suppress. Trial counsel remembered that he informed Petitioner about the anonymous tip that led to Petitioner's arrest at the bus station.

Trial counsel was not aware that Petitioner was taking medication. He remembered that Petitioner may have told him "that he said he had taken previous to getting arrested a hit of acid or something and that was why he was just completely wiggled out the next day at the hearing."

Trial counsel stated that it would have been to Petitioner's "detriment" to have his case severed from the other co-defendants because at trial, the co-defendants testified that Petitioner did not have anything to do with the crimes. The jury, in other words, was able to hear the co-defendants say that Petitioner "was not involved" only because there was a joint trial.

At the conclusion of the hearing, the post-conviction court took the matter under advisement.¹ Later, the trial court determined in a written order that Petitioner only presented evidence at the post-conviction hearing relating to two of the claims raised in the petition for post-conviction relief: (1) probable cause for arrest; and (2) ineffective assistance of counsel. With regard to probable cause, the post-conviction court determined that Petitioner waived this issue for failing to present it prior to trial and that the issue was raised and addressed on appeal. As to Petitioner's claim of ineffective assistance of counsel, the post-conviction court determined that trial counsel was effective.

¹ According to the transcript, at the time of the hearing, post-conviction counsel filed a motion to submit a late-filed exhibit. Apparently, post-conviction counsel sent a request to Social Security to receive Petitioner's records that would indicate he was receiving disability for a mental health condition. The post-conviction court gave post-conviction counsel one month to submit the exhibit. It does not appear from the record that the exhibit was ever submitted to the trial court. On appeal, Petitioner attempted to submit the exhibit to this Court via a Notice of Filing. In an order entered September 27, 2007, this Court dismissed the Notice of Filing and struck it from the record because the post-conviction court did not review the documents contained in the Notice of Filing when ruling on the petition for post-conviction relief.

According to the post-conviction court, there was no basis for the filing of a motion to suppress the photographic identification. Likewise, Petitioner did not show that the failure to file a motion to sever his case from the co-defendants was prejudicial.

After the denial of the petition for post-conviction relief, Petitioner filed a timely notice of appeal.

Analysis *Post-Conviction Standard of Review*

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

A. Failure to File a Motion to Suppress

First, Petitioner argues that trial counsel was ineffective for failing to “file a pretrial motion to suppress photo identification of [Petitioner].” Specifically, Petitioner complains that he was arrested without probable cause and that the photograph taken of him at the police station was the product of an unlawful arrest. Petitioner also states that the improperly obtained photograph somehow affected the in-court identification of Petitioner and that trial counsel did not conduct a “reasonable investigation into the circumstances of the arrest.”

In its order denying the petition for post-conviction relief, the post-conviction court noted that on direct appeal, this Court determined that Petitioner “voluntarily” went to the police station and allowed himself to be photographed. The post-conviction court also noted that Petitioner admitted at the hearing that he did not inform trial counsel that he was under the influence of drugs at the time of his arrest or that he was forcibly removed from the bus station by the police. In other words, trial counsel had no reason to file a motion to suppress. The evidence does not preponderate against the judgment of the post-conviction court. Petitioner has failed to carry his burden in this regard.

B. Failure to File a Motion to Sever

Next, Petitioner claims that trial counsel was ineffective for failing to file a motion to sever his case from his co-defendants. Specifically, Petitioner claims that he was “subject to the spillover effect of evidence offered against the co[-]defendants.” At the post-conviction hearing, Petitioner testified that the evidence at trial introduced against the co-defendants “rubbed off” on him, resulting in a conviction.

In its order denying the petition, the post-conviction court determined that Petitioner failed to present a legal basis for severance. In fact, the post-conviction court pointed out that if Petitioner’s case had been severed from the co-defendants, the jury would not have heard testimony from the co-defendants that they did not know Petitioner and that he was not involved in the crime. We determine that the evidence does not preponderate against the post-conviction court’s conclusion. The evidence at the post-conviction hearing and at trial indicated that the testimony of the co-defendants actually supported Petitioner’s trial strategy and claim that he did not know the co-defendants. Further, even if trial counsel was ineffective for failing to file a motion to sever, Petitioner has failed to show that the failure to file the motion affected the outcome of his trial.

Moreover, trial counsel made this decision after preparing for the case. As stated above, we may not second-guess a reasonably-based trial strategy. *See Adkins*, 911 S.W.2d at 347. This issue is without merit.

Sentencing

Next, Petitioner argues that his sentences were improperly enhanced in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), because the trial court utilized facts not found by a jury. Petitioner acknowledges the Tennessee Supreme Court's decision in *Gomez v. State*, 163 S.W.3d 632 (Tenn. 2005), but argues that *Gomez* was "wrongly decided."²

Courts in Tennessee have held that *Blakely* does not apply retroactively to cases that have already been finalized on direct appeal and are on collateral appeal. *See Donald Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at *10 (Tenn. Crim. App., at Jackson, Dec. 21, 2004), *perm. app. denied*, (Tenn. May 23, 2005); *Carl Johnson v. State*, No. W2003-02760-CCA-R3-PC, 2005 WL 181699, at *4 (Tenn. Crim. App., at Jackson, Jan. 25, 2005), *perm. app. denied*, (Tenn. June 27, 2005). Accordingly, this issue has no merit.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE

²Petitioner's brief was filed prior to the release of the Tennessee Supreme Court's opinion in *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007).